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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JAYDEN H., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ERICA D.,

Defendant and Appellant.

D053719

(Super. Ct. No. J516095B)

APPEAL from a judgment of the Superior Court of San Diego County, Yvonne E. Campos, Judge. Affirmed.

Erica D. appeals the judgment terminating her parental rights to her son Jayden H. She contends the juvenile court erred by summarily denying her Welfare and Institutions Code section 388 petition (all statutory references are to the Welfare and Institutions Code), the adoptability finding is unsupported by substantial evidence, and the court

erred by declining to apply the beneficial relationship and sibling relationship exceptions to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i), (v)). We affirm.

### PROCEDURAL AND FACTUAL BACKGROUND

In December 2005 the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition for three-year-old Jayden because he was exposed to violent confrontations between Erica and her husband, Barron S. Jayden was detained and then placed in foster care. At the March 2007 12-month review hearing, the court terminated Erica's reunification services but continued services for Jayden's father. At the July 18-month review hearing, the court set a section 366.26 hearing. After several continuances, the section 366.26 hearing took place in September 2008. At the time of the hearing, Jayden was in a prospective adoptive home where he had lived since June.

### THE SECTION 388 PETITION

Prior to the section 366.26 hearing, Erica filed a section 388 petition. Section 388 allows the juvenile court to modify an order if a parent establishes, by a preponderance of the evidence, that new evidence or changed circumstances exist and the proposed change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing of those two elements. (*In re Zachary G., supra*, at p. 806; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of granting a hearing, but "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G., supra*, 77 Cal.App.4th at p. 806.) We review the

summary denial of a section 388 petition for abuse of discretion. (*Id.* at p. 808; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431, 433.)

Erica's section 388 petition requested that Jayden be placed with her with family maintenance services. As changed circumstances, the petition alleged that in June 2007 Erica completed parenting and domestic violence classes; in September she completed a program including group therapy and individual therapy; at some point after January 2008 she completed job training; in July she gave birth to a son, Desmond M. who was in her custody; and on an unspecified date she moved out of her domestic violence shelter and into an apartment. Additionally, Erica's counsel told the court that Erica testified against Barron in his criminal trial, she was married to Desmond's father and had a stable home with him, and she had resolved her domestic violence issues. The petition alleged that the proposed modification was in Jayden's best interests because he had a relationship with Erica, he said he wanted to return to her care, and this would allow him to live with Desmond and with his older half brother, D.D.

The court summarily denied the petition, finding that Erica had made a prima facie showing of changed circumstances but not that the proposed change would promote Jayden's best interests. The court noted that Jayden had spent a substantial portion of his life out of Erica's custody and instead of devoting herself to him she chose to have a third child. While Jayden enjoyed seeing Erica, he had suffered substantial emotional damage and behavioral difficulties due to his exposure to domestic violence while in her care. Six-year-old Jayden had not spent much time with two-month-old Desmond, Erica's

parental rights to 12-year-old D.D. had been terminated, and Jayden and D.D. had separate placements throughout the case.

As one of several possible explanations for Jayden's behavioral difficulties, his psychological evaluation stated, "[w]hen the mother had used and abused drugs, the chances were high that Jayden was exposed in the uterus to [her] drug abuse." In a report that was also before the court, the social worker addressed this statement, correctly noting "[t]here is no self report or records that [Erica] used drugs during or before her pregnancy with Ja[y]den." Erica contends that the court erroneously relied on the statement in the evaluation. The court mentioned the statement only in passing, however, and did not place any weight on it.

Erica also contends that the court did not address her assertion that Jayden expressed a desire to return to her care. While he had done so several months earlier, there is no indication that he had done so recently. Moreover, reunification services had long since ended and the focus was on Jayden's need for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317, 324.) The court did not abuse its discretion by denying the section 388 petition in view of its conclusion that Erica had not made a prima facie showing that granting the petition would be in Jayden's best interests.

#### ADOPTABILITY

An adoptability finding requires "clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time." (*In re Zeth S.* (2003) 31 Cal.4th 396, 406, citing *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223.) The Agency bore the burden of proof on this issue. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1557,

1559-1561.) A finding of general adoptability "focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649, italics omitted.) An adoptability finding does not require "that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*Ibid.*) Here, there is substantial evidence supporting the adoptability finding. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732; *In re J.I.* (2003) 108 Cal.App.4th 903, 911; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

Jayden was traumatized by his exposure to domestic violence while in Erica's care. According to his psychological evaluation, he was emotionally disturbed, extremely hyperactive, "un-bonded," and in need of structure and support. The evaluator "wholeheartedly recommend[ed] adoption for Jayden." He was removed from a placement in June 2006 after his caregiver reported sexual acting out. The record contains no explanation of this incident and no indication of any other such behavior. Jayden was removed from three placements in early 2008 due to his aggressive and impulsive behavior which included pulling the hair out of a classroom guinea pig and biting a fellow student. In the last placement, the caregiver's puppy nipped him and he tossed the puppy from his arms, injuring it. In Jayden's next placement, he reported that while disciplining him, his caregiver grabbed the back of his neck and pulled his head back. Finally, he was placed in the prospective adoptive home. The prospective adoptive parent was committed to adopting Jayden and believed she had the tools and understanding to meet his needs. She had the patience and desire to work with Jayden's

challenges and had nearly completed her home study. As a foster parent, she had "already been screened for the factors required in the assessment report." (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 956.)

While psychological and behavioral problems may make it more difficult to find adoptive homes, they do not necessarily preclude an adoptability finding. (*In re Lukas B.*, *supra*, 79 Cal.App.4th at p. 1154; *In re Jennilee T.*, *supra*, 3 Cal.App.4th at pp. 224-225.) The prospective adoptive parent's willingness to adopt Jayden "generally indicates [he] is likely to be adopted within a reasonable time either by [her] or by some other family." (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650, italics omitted.) Despite his troublesome behavior, Jayden was personable, friendly, handsome, and intelligent. He was healthy and had no developmental issues. In addition to his foster parent, there were two families in San Diego County and 28 families elsewhere who were willing to adopt a child with Jayden's characteristics. Construing the record in the light most favorable to the judgment (*In re Josue G.*, *supra*, 106 Cal.App.4th at p. 732; *In re J.I.*, *supra*, 108 Cal.App.4th at p. 911), we conclude that the juvenile court did not err by finding Jayden adoptable.

#### THE BENEFICIAL RELATIONSHIP EXCEPTION

Section 366.26, subdivision (c)(1) allows termination of parental rights upon clear and convincing evidence of adoptability. An exception exists if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) A beneficial relationship is one that "promotes the well-being of the child to such a degree as to outweigh the well-

being the child would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The existence of this relationship is determined by "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs. . . ." (*Id.* at p. 576.) Examining the evidence in the light most favorable to the judgment, we note that at the beginning of the case, Erica maintained regular visitation and contact with Jayden, but 14 months before the section 366.26 hearing, she cancelled 23 visits, some due to problems with her pregnancy or transportation, and some without explanation. Furthermore, Erica failed to meet her burden of showing a beneficial relationship. (*Id.* at pp. 576-577; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)

At the time of the section 366.26 hearing, Jayden was nearly six years old. He had been out of Erica's custody for two years nine months. Visits were always supervised. Erica never asked for extra visitation and rarely telephoned Jayden between visits. While Erica was appropriate and loving with Jayden and he was affectionate and happy to see her, he separated from her easily when visits ended, did not ask for her between visits, and was equally affectionate with other adults. Jayden needed permanency, safety, and structure, which reduced his problematic behavior. Erica did not make Jayden a priority and lacked insight into his behavior and needs. Despite her participation in services related to domestic violence, in May 2008 she invited Jayden's father to a visit although the father had hit Jayden with a belt. At the same visit, Erica discussed the case in

Jayden's presence. The court did not err by declining to apply the beneficial relationship exception.

### THE SIBLING RELATIONSHIP EXCEPTION

Section 366.26, subdivision (c)(1)(B)(v) provides an exception to termination of parental rights if termination would substantially interfere with the child's sibling relationship and the severance of the relationship would be so detrimental to the child as to outweigh the benefits of adoption. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 951-953; § 366.26, subd. (c)(1)(B)(v).) The juvenile court must "balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer." (*In re L.Y.L.*, *supra*, at p. 951, citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Factors to be considered include whether the siblings were raised in the same home; whether they shared significant common experiences or have existing close and strong bonds; and whether ongoing contact is in the child's best interests, including his long-term emotional interest as compared to the benefit of adoption. (§ 366.26, subd. (c)(1)(B)(v).) Examining the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the juvenile court's finding that Erica did not meet her burden of proving the sibling relationship exception. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 947, 952.)

Nearly six-year-old Jayden and two-month-old Desmond never lived together and saw each other only at visits. No sibling relationship had developed. Jayden and 12-



year-old D.D. lived together for the first three years of Jayden's life, but by the time of the hearing had not lived together for nearly three years. D.D. was placed with a paternal relative who was unrelated to Jayden and had a permanent plan of adoption. Jayden and D.D.'s common experiences while in Erica's care included repeated exposure to domestic violence. While they recognized each other as brothers and loved each other, they did not show distress when they parted and Jayden did not ask for more contact. While their caregivers were committed to continuing the visitation the two siblings had enjoyed throughout the case, the benefits to Jayden of adoption far outweighed the benefits he would derive from continuing contact with D.D. The court did not err by declining to apply the sibling relationship exception.

#### DISPOSITION

The judgment is affirmed.

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McINTYRE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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NARES, J.